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AGENT ORANGE IN THAILAND ASSOCIATED TO MALIGNANT LYMPHOMA

Citation Nr: 0418252

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On appeal from the Department of Veterans Affairs Regional Office in Newark, New Jersey

THE ISSUE

Entitlement to restoration of service connection for histiocytic type malignant lymphoma.

REPRESENTATION

Appellant represented by: Veterans of Foreign Wars of the United States

WITNESS AT HEARING ON APPEAL

The veteran

ATTORNEY FOR THE BOARD

K.S. Hughes, Counsel

INTRODUCTION

The veteran served on active duty from August 1968 to August 1972. This matter comes before the Board of Veterans' Appeals (Board) on appeal from a July 1998 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Newark, New Jersey, severing service connection for histiocytic type malignant lymphoma.

In connection with this appeal, the veteran testified at a Travel Board hearing before the undersigned Acting Veterans Law Judge in December 2003. A transcript of that hearing is associated with the claims file.

FINDINGS OF FACT

1. The veteran was awarded service connection for histiocytic type malignant lymphoma in a January 1995 rating decision.
2. At the time of the initial award of service connection for histiocytic type malignant lymphoma, the record contained medical evidence confirming a diagnosis of histiocytic type malignant lymphoma shortly after discharge, the veteran's plausible allegations of in-service herbicide exposure, and corroboration of the veteran's service in Thailand and his maintenance work on B-57 aircraft.
3. The January 1995 award of service connection for histiocytic type malignant lymphoma was not clearly and unmistakably erroneous.

CONCLUSION OF LAW

The criteria for severance of service connection for histiocytic type malignant lymphoma were not met. 38 U.S.C.A. § 5109A(b) (West 2002); 38 C.F.R. § 3.105(d) (2003).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

On November 9, 2000, the President signed into law the Veterans Claims Assistance Act of 2000 (VCAA), which has since been codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West 2002). This change in the law is applicable to all claims filed on or after the date of enactment of the VCAA, or filed before the date of enactment and not yet final as of that date. The Board has considered this new legislation with regard to the issue on appeal and finds that, given the favorable action taken herein, no further notification or assistance pertinent to the issue on appeal is required.

The veteran challenges the propriety of the RO's severance of service connection for histiocytic type malignant

lymphoma. Once service connection has been granted, it can be severed only upon the Secretary's showing that the rating decision granting service connection was "clearly and unmistakably erroneous," and only after certain procedural safeguards have been met. 38 C.F.R. § 3.105(d); *Graves v. Brown*, 6 Vet. App. 166, 170-71 (1994).

The United States Court of Appeals for Veterans Claims (Court) has held that 38 C.F.R. § 3.105(d) places the same burden of proof on the VA when it seeks to sever service connection as 38 C.F.R. § 3.105(a) places upon a claimant seeking to have an unfavorable previous determination overturned. *Baughman v. Derwinski*, 1 Vet. App. 563, 566 (1991). Clear and unmistakable error is defined the same under 38 C.F.R. § 3.105(d) as it is under 38 C.F.R. § 3.105(a). See *Venturella v. Gober*, 10 Vet. App. 340, 342 (1997).

The veteran claims that he was exposed to Agent Orange at Ubon, Thailand, where he worked on airplanes which were used for spraying herbicides in Vietnam. Specifically, he states that he worked on Hayes Dispensers which were coated with a substance, which was foreign to him, and which he now believes was Agent Orange. The veteran essentially reaffirmed his contentions during his December 2003 Travel Board hearing.

The veteran's service personnel records reflect that he had one year, three months, and two days of foreign and/or sea service. These records further show that he served as a weapons mechanic at Ubon Airfield, Thailand.

Private treatment records show that the veteran complained of a mass at the right axillary region in November 1974. A December 1974 cytology and tissue examination report reflects a microscopic diagnosis of changes in lymph nodes consistent with diagnosis of lympho histiocytic type of malignant lymphoma. Subsequent medical records, including a May 1990 report of VA examination for Agent Orange, show treatment for recurrent skin lesions.

The rating decision that granted service connection for histiocytic type malignant lymphoma in 1995 listed the evidence used for the determination as the service administrative records, a May 1994 VA examination report, and private medical records. The rating decision notes that, although the veteran did not serve in Vietnam, he presented a plausible explanation as to how he could have come in contact with Agent Orange and, given the fact that he had histiocytic type malignant lymphoma diagnosed in 1974, all reasonable doubt was resolved in his favor and service connection was granted and a schedular evaluation of 30 percent was assigned.

Thereafter, in February 1995, the RO requested verification from the United States Army and Joint Services Environmental Support Group (ESG) as to the storage, handling, or use of Agent Orange at Ubon Airfield.

In May 1995, the ESG responded that herbicides were not stored or sprayed near United States personnel in Thailand and that it was unable to confirm that the veteran worked on equipment that contained Agent Orange.

In August 1995, the RO requested an advisory opinion from the Veterans Benefits Administration, Compensation and Pension Service, as to whether the January 1995 rating decision was clearly and unmistakably erroneous in granting service connection for histiocytic type malignant lymphoma.

The Director of Compensation and Pension Service subsequently replied that action to sever service connection may not be initiated unless it can be clearly established that the veteran was never exposed to herbicide agents during his military service. The RO was further advised that the burden of establishing this fact rests with VA.

In an October 1997 rating decision, the RO proposed to sever service connection for histiocytic type malignant lymphoma. The veteran was advised of the proposed severance in an October 1997 letter.

The veteran responded to the notification of the proposed severance in October 1997, stating that he was assigned to replace and inspect Hayes Dispensers while on duty in Thailand. He said that the dispensers came from Vietnam and "were coated with an oily petrol type substance" which he believed was Agent Orange. In addition, the veteran provided a copy of a performance report, dated in March 1971, which notes that he performed inspections and replacement of items on all assigned Hayes Dispensers.

In a July 1998 rating decision, the RO severed service connection for histiocytic type malignant lymphoma on the basis that "the preponderance of the evidence is unfavorable" and "the rule regarding benefit of reasonable doubt does not apply." The veteran disagreed with the July 1998 rating decision and initiated this appeal.

In a September 1999 letter to the Director, Compensation and Pension Service, the veteran's accredited

representative argued that it had not been shown by VA that there was no conceivable way to maintain service connection and, thus, the severance of service connection was premature. Specifically, the veteran's representative argued that the veteran's claim of herbicide exposure as a result of contact with aircraft equipped with Hayes Dispensers had not been resolved.

In March 2000, the RO was instructed by the Director, Compensation and Pension Service, to contact the United States Armed Services Center for Unit Records Research (USASCURR) (formerly ESG) and request information about the possible contamination of the Hayes Dispensers which the veteran came into contact with during his tour in Thailand.

In October 2001, USASCURR responded that it was unable to confirm or locate documentation indicating that Ranch Hand aircraft (used to spray herbicides over South Vietnam) originated from Ubon Air Force Base in Thailand. However, USASCURR further stated that the "Hayes Company" developed the spray equipment used in the Ranch Hand defoliation program. The issue of "possible contamination" of the Hayes Dispensers with which the veteran came into contact was not addressed.

In a June 2003 Supplemental Statement of the Case, the RO again declined to restore service connection on the basis that "the evidence does not establish that the veteran was exposed to Agent Orange while in service" and the "the preponderance of the evidence is against his claim, and there is no doubt to be resolved."

The RO has simply applied the wrong legal standard. As noted previously, 38 C.F.R. § 3.105(d) mandates that there be clear and unmistakable error in the prior rating decision in order to sever service connection, and the burden is on VA to produce evidence of such error. While the RO stated "it has not been verified that the veteran handled, used, stored, or was in any way exposed to Agent Orange, or that he came into contact with equipment that may have been exposed to Agent Orange, during his service in Thailand" that statement is not correct. In fact, the veteran did come into contact with equipment that may have been exposed to Agent Orange, the Hayes Dispensers.

It is not disputed that the veteran served in Ubon, Thailand, and worked on the Hayes Dispenser weapons system on B57 aircraft. It is not disputed that the Hayes Dispenser weapons system and B57 aircraft were used in the Operation Ranch Hand defoliation program. It is not disputed that the defoliation program continued during the time period the veteran worked on the Hayes Dispenser weapons system. It is not disputed that the veteran developed a lympho histiocytic type of malignant lymphoma shortly after his discharge from active service.

On the other hand, it could not be verified that B-57G aircraft were used to spray herbicides during 1970 and 1971, and it could not be confirmed that Ranch Hand aircraft flew missions out of Ubon, Thailand.

The RO essentially used a lack of information concerning herbicide exposure as the evidence to sever service connection. This had the effect of placing the burden of proof on the veteran, impermissible under 38 C.F.R. § 3.105(d), and insufficient to justify a finding of clear and unmistakable error in the grant of service connection.

While, in hindsight, the decision to grant service connection for histiocytic type malignant lymphoma in 1995 may certainly be second-guessed, it may not be overturned based on the evidence of record. Accordingly, service connection for histiocytic type malignant lymphoma is restored. 38 U.S.C.A. § 5109A(b); 38 C.F.R. § 3.105(d).

ORDER

The appeal is granted, and service connection for histiocytic type malignant lymphoma is restored.

RONALD W. SCHOLZ
Acting Veterans Law Judge, Board of Veterans' Appeals